UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

D.C. Cir. No. 05-5131

CSX TRANSPORTATION, INC.,

Plaintiff-Appellant,

v.

ANTHONY A. WILLIAMS, et al.,

Defendants-Appellees.

SUPPLEMENTAL OPPOSITION BY THE DISTRICT OF COLUMBIA APPELLEES TO CSX TRANSPORTATION'S EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL OR SUMMARY REVERSAL

ROBERT J. SPAGNOLETTI
Attorney General for the District of Columbia

EDWARD E. SCHWAB
Deputy Attorney General
Appellate Division

MARY L. WILSON
Senior Assistant Attorney General
Appellate Division

Office of the Attorney General
One Judiciary Square
441 4th Street N.W.
Washington, D.C. 20001
(202) 724-5693

The District's Terrorism Prevention Act was enacted, and this case is here, because relevant federal agencies have failed to use ample powers available to them to take action to prevent terrorist attacks against likely terrorist targets in Washington D.C. The District of Columbia does not seek through its law to have any long-term effect on CSX or any other railroad or to impede rail traffic or cause other disruption to such traffic. It has enacted a law to take weapons from terrorists and has used traditional police powers in an area federal authorities have neglected. Federal authorities have failed to protect the residents of the District and visitors to the Nation's Capitol from becoming the victims of the inevitable collateral damage from a terrorist attack on likely targets. If the needed steps the District has taken do in fact prove to be disruptive to CSX, federal authorities can step in with uniform preemptive measures that insure that hazardous materials are not routed near likely targets. The absence of a coherent federal regulatory policy has created a situation under which it is more important that the trains run on time than it is to provide protection from terrorists. The failure of such protection means that the federal regulations do not preempt the operation of the District's law.

The United States' approach deprives the states and the District of a role in protecting themselves from terrorist attacks on hazardous cargo. The United States delegated the responsibility to CSX to protect hazardous cargo from terrorist attack, and CSX has not taken adequate precautions to prevent attacks.[1]

---

[1] The ineffectiveness of CSX's anti-terrorism plan is shown in three photographs submitted to the district court (A.-2363-2366, attached hereto). Two photographs show James Doughtery, Sierra Club's counsel, standing on CSX tracks near the Capitol. The photographer's affidavit states that their access to the track was not obstructed and they saw no evidence of security personnel. A. 2364. The third photograph shows a train on CSX's tracks, taken from the L'Enfant Plaza station, and shows that a terrorist standing at that station could use a shoulder-fired missile to attack a CSX train carrying lethal chlorine gas. A.2364-65. These photographs are a chilling depiction of how easily a terrorist could place a bomb on the tracks or otherwise sabotage one of CSX's rail cars carrying deadly chemicals despite CSX's plan. See also A.967.

The United States urges that the actual *quality* of CSX's plans is irrelevant to the issue of preemption. U.S. Mem. at 9 n.3. The United States could not argue otherwise considering that the only details known about the plan are that: it relates to terrorism, and it contains unspecified measures that address "en route security" and "assessed security risks" from origin to destination, *id.* at 4, 6, but allows "unhindered access [of terrorists and others] to its rail routes running through the District of Columbia[.]" Mem.op. 29, A.-2591, quoting U.S. Statement. The plan provides for background checks for CSX personnel and "measures to guard against unauthorized access to the hazardous cargo." *Id.* at 4. As the district court emphasized, by the federal government's own estimate, a large company requires only about 50 hours to develop a security plan that meets the requirement of the regulations – and those 50 hours would be spent on all of CSX's thousands of miles of rails, not just the rails in the District. A-2590. The federal agencies have determined that CSX's plan complies with the somewhat vague regulatory requirements but there is no evidence that CSX's plan tries to stop missile attacks or even keep people away from its tracks. There are civil penalties for enforcement of the plan, but no evidence that any federal authority monitors compliance. Plainly, there is no evidence of any effective plan in place by the United States or CSX to prevent terrorist attacks on trains in the District. The plan permits the routing of dangerous cargo within the zone of danger near the Capitol and other terrorist targets.

The implications of staying implementation of the Act are enormous. As the district court found, one study estimates that an attack on a single rail tank car of chlorine traveling through Washington, during a celebration or political event, could kill or seriously harm up to 100,000 people within a half hour. A-2629. The toxic plume resulting from such an attack could extend over 40 miles from the point of release, including a core area of many miles in which exposure

could be deadly. A.-2565. The need to protect the Capitol and its environs is a national concern, but the train tracks go through the District of Columbia, not the Capitol grounds, and that toxic plume would cover countless local District of Columbia homes, schools, playgrounds, hospitals and businesses.

The District's law is not preempted by any of three separate federal statutes. In arguing error, CSX does not explain how the district court erred, instead it merely parrots the arguments it made below, failing to meaningfully address the central basis of the district court's preemption findings: that each of the federal statutes explicitly *preserves* non-federal regulation in its respective subject matter, so long as the local safeguard are not incompatible with the federal scheme. A-2584.

The first of these laws, the Federal Railroad Safety Act, sets out situations in which states can act. Under the FRSA's preemption provision, states may adopt or continue in effect a law related to railroad safety until DOT issues a regulation or order "covering the subject matter" of the state rule. 49 U.S.C. 20106. Even where DOT has taken action covering a particular subject matter, a state may impose an additional or more stringent requirement addressing the same subject matter if the state requirement satisfies all three components of the "savings clause" in section 20106, under which the state requirement must (1) be "necessary to eliminate or reduce an essentially local safety or security hazard," (2) not be incompatible with any federal laws, regulation, or order, and (3) not unreasonably burden interstate commerce. Id .

They also argue that the Act is preempted by the Hazardous Materials Transportation Act because it prevents or operates as an obstacle to shippers' and carriers' ability to carry out the

hazardous material security rules adopted by DOT in March 2003. See 49 U.S.C. 5125 (a).[2] In promulgating those regulations, DOT stressed the importance of giving railroads and shippers flexibility to tailor their security plans to their individual circumstances. 68 Fed. Reg. at 14513-15, 14517. Indeed, DOT concluded that the viability of the rule depends on such flexibility: "if it is to be effective, a regulation mandating development and implementation of a security plan must provide sufficient flexibility so that a shipper or carrier can adapt its requirements to individual circumstances." *Id.* at 14515.

1. CSX and the United States assert that a terrorist attack in the District of Columbia does not involve an essentially local safety hazard under the FRSA. Indeed, CSX asserts that there is nothing different about the terrorist threat faced by the District of Columbia and that "all Americans living near rail lines bear the same risk" of catastrophic terrorist attack and the Act simply transfers this "inherent risk of hazardous material transport" from the District to other locations. Mot. at 18-19. The United States makes the astounding assertion that District of Columbia citizens have no local interest in a terrorist attack because terrorism is a national concern. The Terrorism Prevention Act addresses a unique local hazard that threatens our citizens unlike any other citizens in the country. "Although the District of Columbia is not alone in confronting the threat of terrorism, it cannot seriously be contested that the District faces disproportionate risks." Mem.op. 69, A-2631. The lure for the terrorists may be the Capitol (or the White House or the monuments), but the District's legislation is not aimed at protecting just the Capitol. If there is an attack on a hazmat rail car because of its proximity to the Capitol, and

[2] Section 5125 (a) preempts a state or local requirement if (1) complying with it and a requirement imposed by the HMTA or regulations issued thereunder "is not possible," or (2) the state or local requirement "is an obstacle to accomplishing and carrying out" the HMTA or regulation implementing it.

a release kills thousands of the District's citizens, that makes it the District's business to address that threat. The rail line runs through the District, not the grounds of the Capitol.

2. CSX and the United States argue the District's law is incompatible with federal law. That is hardly the case here. The District has acted to provide safety to its residents, because of inaction by federal regulators. Federal preemption principles plainly permit this.

The United States argues that "[t]he March 2003 regulations represent the judgment of the federal regulators that the security plan approach is preferable to imposition of routing restrictions and other prescriptive requirements." U.S. Memo. At 7 (citing 68 Fed. Reg. 14510 (Mar. 25, 2003)). The United States is incorrect; those regulations do not reveal any extensive federal "judgment" about this crucial topic, but instead reflect an *abdication* of that judgment. The referenced 10 pages of comments (and only one of actual regulations) are little more than a voluntary compliance scheme, requiring shippers only to submit a "security plan" and train their employees. The regulations impose no other specific requirements on rail carriers, allowing them to self-identify security risks and "put into place" self-chosen "appropriate measures" to "address" those risks. 68 Fed. Reg. at 14521. The district court correctly found that these regulations could not be considered comprehensive. *See* Mem. Op. at 28 ("The [federal] government could not have intended this level of effort [approximately 50 hours to develop a security plan] to comprehensively 'cover' the crucial matter of rail hazmat security."). Consequently, the views of the United States on this topic are plainly wrong.

Any "reasoning" that appears in the referenced rulemaking appears to be a simple regurgitation of industry comments. See 68 Fed. Reg. at 14519. The US DOT concludes there that non-federal jurisdictions "should not be permitted to impose hazardous materials

transportation security requirements that differ from, or are in addition to, those adopted in this final rule." *Id.* But that seemingly broad preemption directive is contradicted by express language further down the page explicitly authorizing non-federal law. *Id.* Moreover, the US DOT noted that "[c]ommenters who addressed this issue unanimously agree" with the preemption conclusion. However, that asserted unanimity means only that the agency was not privy to (and therefore did not seriously consider) legitimate non-preemption arguments like the District's here. In that case, the weakness of the agency's "reasoned judgment" reduces the amount of deference owed to it. *Public Citizen, Inc. v. HHS*, 332 F.3d 654, 661 (D.C. Cir. 2003).

The District's Act requiring CSX to divert less than one percent of its rail traffic from the District unless it can show no practical alternative route, is not in direct conflict with or an obstacle to the United States requirement that CSX develop a plan to help stop terrorism along its entire line. As the district court concluded, the Act "does not directly conflict with or repeal any federal law," A.-2620, and in fact the Act's "temporary ban on the passage of ultrahazardous materials seems to further the underlying safety and security purposes of the federal regulations." A-2592. The case of *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000), does not compel preemption of the District's law when the federal government itself has not yet developed a carefully researched and deliberate plan to meet the unique risk of terror in the District.

3. There is no substantial burden on interstate commerce. CSX starts its argument with a blatant misrepresentation of the facts. It disingenuously describes the burden of having to divert empty hazmat rail cars from the District of Columbia when counsel for the District of Columbia stated at the hearing below March 23, 2005, that the District of Columbia was promulgating regulations that would "allow CSXT to get an annual permit for all their empties, so long as upon

request by the District, they can show bills of lading that [those cars are] empty. Tr. 112 – 113, A.1823. District counsel stated:

> So it's [the empties] not an issue. It was always a nonissue. We spoke with CSXT early in the process when we started thinking about drafting the implementing rules, because the statute itself is not self-executing. You know, they raised a legitimate concern, and the concern has been addressed.

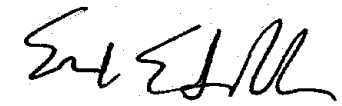
Tr. 113. Despite this assurance from government counsel that a permit could be issued for the empty rail cars, CSX has not applied for such a permit under the emergency regulations, A-2473, and instead continues to cite the burden of re-routing empties as part of their alleged irreparable harm and part of the burden on commerce. CSX has imposed this burden on itself.

CSX, the United States, and the amici describe the impact of the law on rail transportation in draconian terms not supported by the record. The record shows only that less than one percent of CSX's total rail traffic has to be diverted. Indeed, beginning in mid-2004 CSXT implemented a partial, intermittent rerouting program on its own initiative, with no reported adverse consequences. The record makes clear that the incremental burden of extending this program to a few thousand additional railcars annually will be insignificant. CSX's claim of irreparable harm was properly rejected by the district court.

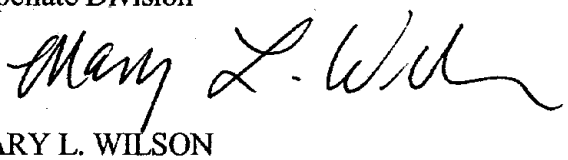
There are a huge number of lives at risk and the District of Columbia readily concedes the United States' point that this case demonstrates a compelling need for a comprehensive national solution to the possibility of a terrorist attack on hazardous rail freight here. U.S. Mem. 17. At such time as the United States develops and implements such a plan, the District's Terrorism Prevention Act will become obsolete. Until that time, the Court should require CSX to comply with the Act.

Respectfully submitted,

ROBERT J. SPAGNOLETTI
Attorney General for the District of Columbia



EDWARD E. SCHWAB
Deputy Attorney General
Appellate Division



MARY L. WILSON
Senior Assistant Attorney General
Appellate Division

Office of the Attorney General
One Judiciary Square
441 4th Street N.W.
Washington, D.C. 20001
(202) 724-5693

Certificate of Counsel

The undersigned hereby certifies that copies of the foregoing filing were delivered by U.S. Mail, first class postage prepaid, this 22nd day of April, 2005, to:

G. Paul Moates
Carter G. Phillips, Esq.
Virginia A. Seitz, Esq.
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005
VSeitz@Sidley.com

Irvin B. Nathan, Esq.
Mary Gabrielle Sprague, Esq.
Arnold & Porter LLP
555 12th Street, N.W.
Washington, D.C. 20004-1206
Irvin_Nathan@aporter.com
Mary_Gay_Sprague@aporter.com

Irene Solet
Civil Division, Appellate Staff
U.S. Department of Justice
Room 7214
950 Pennsylvania Avenue NW
Washington, DC 20530
Irene.Solet@usdoj.gov

James R. Wrathall
Marc Blitz
Wilmer Cutler & Pickering
2445 M Street, NW
Washington, DC 20037
james.wrathall@wilmerhale.com

Robert M. Jenkins III
David M. Gossett
Mayer Brown Rowe & Maw, LLP
1909 K Street, NW
Washington, DC 20006-1152
dgossett@mayerbrownrowe.com

Nicholas James DiMichael
Thompson Hine & Flory
1920 N Street, N.W.
Washington, DC 20036
Nicholas.DiMichael@Thompsonhine.com

Paul M. Donovan
Laroe Winn Moerman & Donovan
4135 Parkglen Court NW
Washington DC 20007
Paul.Donovan2@verizon.net

Mary L. Wilson

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CSX TRANSPORTATION, INC. Plaintiff, v. ANTHONY A. WILLIAMS, et al. Defendants	Civ. Action No. 05-338 (EGS)

SUPPLEMENTAL ORDER

In its April 18, 2005 Memorandum Opinion & Order, this Court quoted the January 26, 2005 sworn congressional testimony of Richard A. Falkenrath, the former Deputy Homeland Security Advisor and Deputy Assistant to the President, that "'since 9/11 we have essentially done nothing' to reduce the inherent vulnerability of our chemical sector." *See CSX Transp. v. Williams*, 2005 WL 902130, at *3-*4, *29 (D.D.C. Apr. 18, 2005). The Court hereby supplements its April 18th Opinion by taking judicial notice of the article appearing in The Washington Post on April 22, 2005. *See* Spencer S. Hsu, *Ex-Official Faults Hazmat Rail Safety*, The Washington Post, April 22, 2005, at A8 (quoting Stephen J. McHale, the former deputy administrator of the Transportation Security Administration, that "[t]here is no comprehensive, national plan" in place to secure the rail system in the United States and expressing McHale's "'disappointment at the pace and the amount of resources' directed by the United

States to secure hundreds of containers of chemicals, explosives and other dangerous materials crisscrossing the country daily"). The article is appended to this Supplemental Order. See Fed. R. Evid. 201(c); *e.g.*, *The Washington Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) (taking judicial notice of newspaper articles); *accord Government of Rwanda v. Rwanda Working Group*, 227 F. Supp. 2d 45, 60 n.6 (D.D.C. 2002).

Signed: Emmet G. Sullivan
United States District Judge
April 22, 2005

washingtonpost.com

Ex-Official Faults Hazmat Rail Safety

Federal Agencies Oppose D.C. Law

By Spencer S. Hsu
Washington Post Staff Writer
Friday, April 22, 2005; Page A08

The former deputy administrator of the U.S. Transportation Security Administration said yesterday that the government lacked adequate plans to secure rail shipments of hazardous cargo in Washington and across the country during his tenure.

Stephen J. McHale, the agency's second-ranking official from 2002 to August 2004, offered his assessment during a panel discussion at the Center for American Progress in Washington. He expressed "disappointment at the pace and the amount of resources" directed by the United States to secure hundreds of containers of chemicals, explosives and other dangerous materials crisscrossing the country daily.

McHale, now a lawyer with Patton Boggs LLP, spoke while the U.S. District Court of Appeals in the District is considering a challenge brought by rail giant CSX Transportation Inc. of Jacksonville, Fla., against the D.C. government, which recently banned hazardous rail shipments. Yesterday, the U.S. departments of Justice, Transportation and Homeland Security filed briefs in support of CSX.

On Monday, a lower court upheld the District ban of rail shipments of toxic materials such as chlorine within two miles of the U.S. Capitol, citing in part the federal government's failure to show that it had taken comprehensive steps to address the risk of a terrorist attack. On Tuesday, the appeals court stopped the law from taking effect while it weighs the case.

McHale said U.S. security officials lacked sufficient money, inspectors and arrangements with privately owned railroads to appropriately protect the public. He said the problem stemmed from a lack of attention from Congress and the White House and a "diffusion of responsibility" among federal agencies. The Bush administration, he said, views railroad security as largely the responsibility of the private sector.

"Basically, there is not enough money. There is no comprehensive, national plan. . . . We can do better, but it is going to be difficult, given the scope and organization of the system," McHale said. Referring to the 42-mile Washington rail corridor, McHale said he opposed the District ban, but he added, "You can do things to secure the system, but enough has not been done to date."

In response to McHale's comments, TSA spokesman Mark Hatfield Jr. released a written statement. "We're the first to acknowledge there is room for security improvements in rail," he said. "Much has been accomplished and the partnership TSA has forged with industry and local governments paves the way for significant continued gains."

McHale's comments followed inspector general reports criticizing TSA management during his tenure

for lavish spending on amenities at headquarters, contracting problems that have ballooned in cost by hundreds of millions of dollars and lapses in the screening of air passengers.

Several independent commissions and former officials also have warned the public about the lack of progress in securing ground transportation systems and chemical stockpiles. For instance, the United States is spending $4.6 billion for aviation security this year but $32 million for surface transportation security. TSA employs 45,000 people for its air screening program but received funding only recently to increase the number of rail security inspectors from three to 100.

After the March 2004 commuter train bombings in Madrid, CSX voluntarily rerouted all but 87 cars containing hazardous materials from one line that passes through downtown and shipped about 1,645 cars on a second line that passes mostly through Northeast Washington, in consultation with U.S. security officials, according to court documents filed early this year.

TSA has acknowledged the problem. It conducted the country's first urban rail corridor study here last year and is implementing a $7 million plan to add fencing, patrols and other safeguards.

McHale said additional precautions are needed, such as limited rerouting, securing information about hazardous shipments, minimizing waiting times, using decoy cars and increasing track inspections.

McHale said the D.C. case has provoked "the best debate we've had with rail security since 9/11, or at least since Madrid. This will help force the federal government to respond and to recognize it has to have a more visible security strategy with the rail industry."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CSX TRANSPORTATION, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
ANTHONY A. WILLIAMS *et al.*,	)	
	)	Civil Action No. 1:05CV00338 (EGS)
Defendants,	)	
	)	
SIERRA CLUB,	)	
	)	
Defendant-Intervenor.	)	

DEFENDANT-INTERVENOR SIERRA CLUB'S LIMITED RESPONSE TO UNITED STATES NOTICE OF FILING OF DECLARATION OF TSA DIRECTOR OF RAIL SECURITY AND PROFFER OF ADDITIONAL IN CAMERA, EX PARTE TESTIMONY

This filing responds to the United States' offer, in its filing on Friday evening, April 1, 2005, to make a "detailed in camera, ex parte presentation on specific rail security measures presently in place and being implemented in the District of Columbia." The Sierra Club strongly objects to the United States' position that this Court can grant CSXT's Motions for a Preliminary Injunction and Summary Judgment on the basis of factual information that the United States will not make available for review or questioning -- let alone discovery -- by either Defendant District of Columbia or Defendant-Intervenor Sierra Club.[1]

[1] There is no reason that the United States could not have submitted Mr. Rybicki's Declaration, or offered to expand upon in it, over a month ago with its February 25, 2005 Statement of Interest supporting CSXT's Motion for a Preliminary Injunction.

The Sierra Club respectfully submits that such discovery -- together with input from the Sierra Club's experts on rail security -- is indispensable to resolving the numerous complex and technical questions likely to arise about whether the specific rail measures purportedly taken by the federal government and CSX actually address the terrorism risk that is the subject of the District's Terrorism Prevention Act. Among the questions that the Court should ask about each purported security feature (e.g. remote video cameras) of the plan(s) are:

1. Is the feature already in place today, or is it simply planned for the future? What is the proof that it is in place?

In the past, CSXT has announced security measures that were not in fact adopted.

2. Given the proximity of CSXT's East-West line -- as well as its North-South line -- to the Capitol, is each security plan feature constantly in effect on *both* of these lines? What is the proof of this?

In the past, CSXT has announced the adoption of security measures that were adopted only for its North-South line.

3. Has the government implemented each of the measures described by Richard A. Falkenrath, former Deputy Homeland Security Adviser to the President, in his March 29, 2005 editorial (submitted as Ex. 46 with CSXT's April 1, 2005 filing), including "adopt[ing] container signs that do not reveal the contents to most observers," "strengthen[ing] the physical resilience of chemical containers," and "ship[ping] decoy containers alongside filled containers"?

4. Has the federal government issued regulations or laws imposing the "harsh civil and criminal penalties" that Dr. Falkenrath recommended in his March 29, 2005 editorial for shippers and transporters that fail to implement the federal government's security measures and, if not, how has the federal government assured compliance with its security measures.

5. For each security plan feature, what risk-based analysis has been performed to show that it (a) will be effective and (b) will be more effective, and less costly, than the re-routing mandated by the DC Terrorism Prevention Act. Specifically, how will each feature reduce either (i) the probability of a terrorist attack, and/or (ii) its consequences?

CSXT has previously noted that Homeland Security and the Department of Transportation will base any rail security measures on a "comprehensive-risk based approach." See Plaintiff's Memorandum of Points and Authorities in Support of Motion for a Preliminary Injunction, at 30 n.6. Such an approach must specifically analyze effects on probability and consequences. As the Sierra Club has demonstrated, the total terrorism risk at issue here is the probability of an attack multiplied by its likely consequences. See Sierra Club Opposition to Plaintiff's Motion for Preliminary Injunction, Ex.6, Declaration of Fred Millar, ¶ 70, Ex. 5, Declaration of Ronald P. Koopman, ¶ 16. Security features that do not reduce at least one of these features significantly are inconsequential.

6. How precisely would the U.S./CSXT security plans address terrorism scenarios such as:

(a) the use of a shoulder-fired missile by a terrorist standing in the L'Enfant Plaza Station location from which the photograph attached hereto as Ex.1 (and originally included in the Sierra Club's Opposition to Plaintiff's Motion for Preliminary Injunction, Ex. 28);

(b) hand placement of an explosive on the CSXT tracks via pedestrian access to CSXT's tracks of the kind shown in the photographs in Ex. 2;

(c) use of a truck bomb placed under a rail bridge within the District, and

(d) use of a bomb that is attached to a rail car before entering the District (and then activated by remote control near the Capitol)?

Respectfully submitted,

James B. Dougherty (D.C. Bar No. 939538)
Sierra Club-Washington D.C.
709 3rd St., S.W.
Washington, D.C. 20024
(202) 488-1140

/s/ James R. Wrathall
James R. Wrathall (D.C. Bar No. 423631)
Melanie D. Coates (D.C. Bar. No. 453322)
Marc J. Blitz (admitted *pro hac vice*)
Brian Boynton (D.C. Bar No. 483187)
Leondra R. Kruger (admitted *pro hac vice*)
WILMER CUTLER PICKERING HALE AND DORR LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
(202) 663-6363 (fax)

Attorneys for Defendant-Intervenor Sierra Club

Dated: April 3, 2005

Exhibit #1

Chlorine shipment on North-South Line at L'enfant Plaza, March 11, 2005

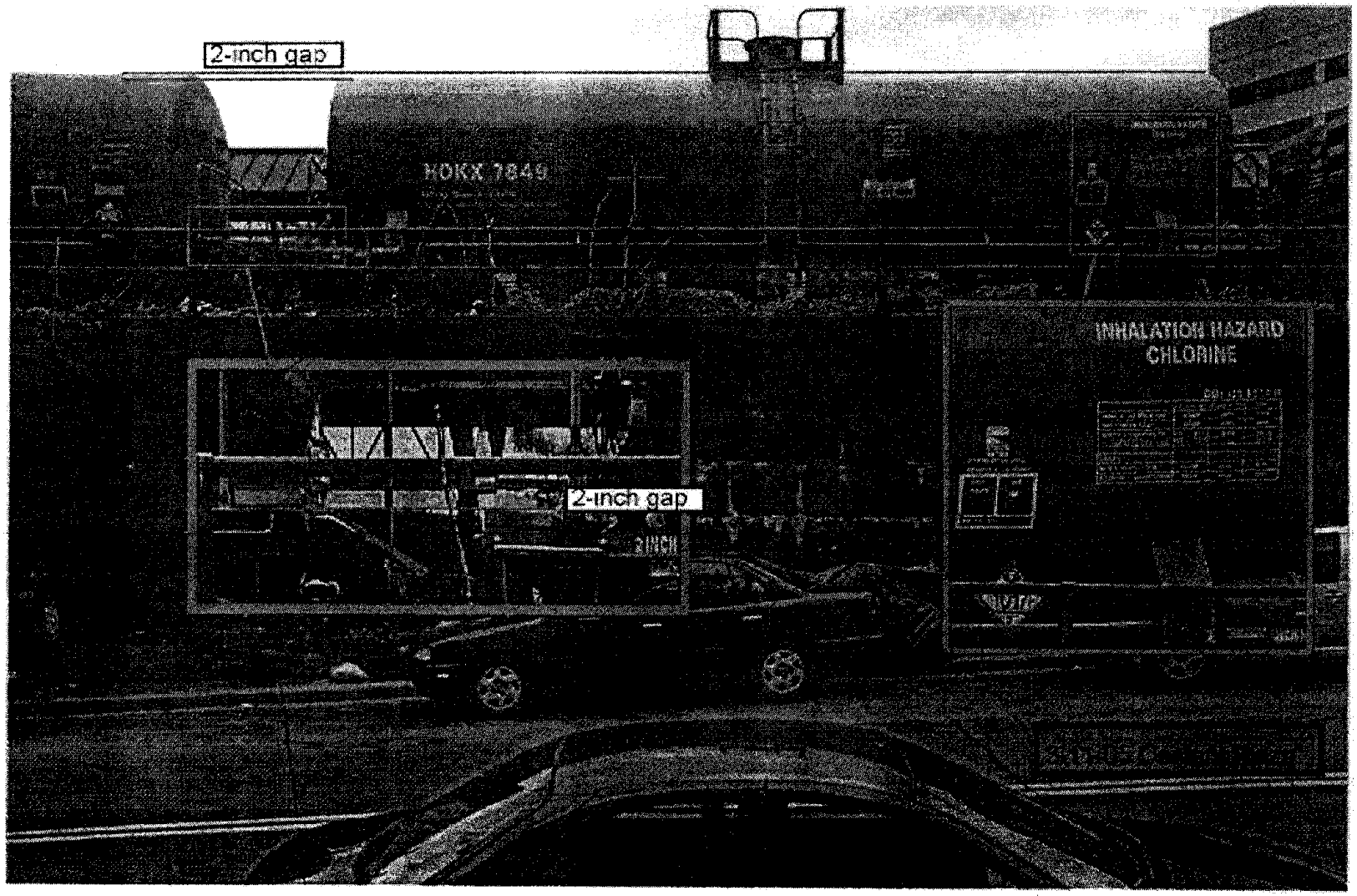


Exhibit #2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CSX TRANSPORTATION, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
ANTHONY A. WILLIAMS *et al.*,	)	
	)	Civil Action No. 1:05CV00338 (EGS)
Defendants,	)	
	)	
SIERRA CLUB,	)	
	)	
Defendant-Intervenor.	)	

DECLARATION OF GWYN E. JONES

Pursuant to 28 U.S.C. § 1746, I declare as follows:

1. I reside at 709 Third St., SW, Washington, D.C.

2. I am over the age of 21 and competent to testify to all facts set forth herein.

3. Today I took the two attached photographs of James B. Dougherty standing on the CSX rail tracks near the U.S. Capitol. The photographs accurately depict the scene as I saw it.

4. During the approximately ten minutes during which we were standing or walking near the railroad tracks, I saw no evidence of security personnel or security measures. At no time was our access to the tracks obstructed or, as far as I could tell, observed.

5. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 3, 2005

/s/ Gwyn E. Jones
Gwyn E. Jones